

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBBIN L. BAKER)	
Claimant)	
VS.)	
)	Docket No. 1,010,427
TOTAL HOME CARE AND HOSPICE)	
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the March 29, 2004 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

This is a claim for a November 19, 2002 accident. In the March 29, 2004 Order, Judge Clark awarded claimant both medical benefits and temporary total disability benefits after finding claimant was not under the influence of marijuana at the time of the accident.

Respondent and its insurance carrier contend Judge Clark erred. They argue the accident is not compensable under the Workers Compensation Act as claimant was impaired by marijuana at the time of the accident. Consequently, respondent and its insurance carrier request the Board to reverse the preliminary hearing Order and to deny claimant's request for benefits.

Conversely, claimant requests the Board to affirm the March 29, 2004 preliminary hearing Order. First, claimant argues the results of a drug test performed after the accident are not admissible as there was no probable cause to believe she had used, possessed, or was impaired by alcohol or drugs while working. Second, claimant argues the evidence does not establish she was impaired at the time of the accident or that she used or consumed drugs or alcohol that contributed to the accident.

The issues before the Board on this appeal are:

1. Was there probable cause to believe claimant used, possessed or was impaired by alcohol or drugs while working so as to consider the results from a chemical test?
2. If not, did respondent and its insurance carrier otherwise prove claimant's accident was contributed to by the use or consumption of drugs or alcohol?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the record compiled to date, the Board finds and concludes:

At approximately 12:30 p.m. on November 19, 2002, claimant was seriously injured when she failed to yield the right of way to a dump truck at an intersection in northern Sedgwick County. Claimant was unconscious after the accident and was flown by helicopter to a local Wichita hospital. As part of its investigation, the Kansas Highway Patrol obtained claimant's blood sample, which was later tested for tetrahydrocannabinol and carboxytetrahydrocannabinol.

Claimant's job duties with respondent included meeting with nursing home, hospice and retirement home patients and their families to determine what services respondent might provide. At the time of the accident, claimant was driving east from Sedgwick, Kansas, where she had met with a nursing home patient. At the intersection where the accident occurred, the two-lane road that claimant was on intersects with a north-south, four-lane road that was formerly U.S. Highway 81. The intersection is controlled by stop signs for the east-west, two-lane road. The north-south traffic does not stop.

The dump truck driver, who was driving north with a load of hot asphalt at the time of the accident, testified he believed claimant was stopped at the intersection as he approached. He also testified he was traveling between 50 and 60 miles per hour when the accident occurred and was unable to stop or swerve to avoid the accident.

The parties stipulated claimant's accident arose out of and in the course of employment with respondent. But respondent and its insurance carrier contend the claim is not compensable as claimant was allegedly impaired by marijuana at the time of the accident and such impairment contributed to the accident.¹

Without the results from the blood sample, there is very little evidence, if any, to suggest that claimant was impaired at the time of the accident. There is no evidence claimant appeared impaired to those who saw and spoke with her the morning of the accident. Likewise, neither drugs nor drug paraphernalia were found in claimant's car or

¹ K.S.A. 44-501(d)(2).

clothing after the accident. Neither claimant nor her car smelled of marijuana. Similarly, there is no evidence that claimant was driving erratically before the accident.

Before the results of a chemical sample are admissible, the Act requires that probable cause exist at a time contemporaneous with the taking of the sample to believe the worker “used, had possession of, or was impaired by the drug or alcohol while working.”² The only evidence that respondent and its insurance carrier cite that could possibly establish the required probable cause was the manner in which the accident occurred. In short, respondent and its insurance carrier contend the only explanation as to why claimant failed to yield the right of way to the dump truck was because she was impaired.

In *Foos*,³ the Kansas Supreme Court reiterated that probable cause means something more than a mere possibility. The Kansas Supreme Court held, in part:

“Probable cause” is a phrase which has acquired peculiar and appropriate meaning in the law. We have previously explained that “probable cause” refers to a quantum of evidence which would lead one to believe that something (for example, that a crime had been committed) is more than a possibility. Thus, paraphrasing 44-501(d)(2)(A) and (B), before test results can be submitted in a workers compensation hearing, there must be sufficient evidence to lead one to believe that it was more than a possibility that the employee used, had possession of, or was impaired by drugs or alcohol while working, and the test sample must have been collected at a time contemporaneous with the events establishing this belief. (Citations omitted.)

The dissent in *Foos* further points out that probable cause is something more than a reasonable suspicion.

Reasonable suspicion is considered to be a lesser standard than probable cause. *State v. Pritchett*, 270 Kan. 125, Syl. ¶ 3, 11 P.3d 1125 (2000); *Twigg*, 185 W. Va. at 159.

Probable cause is to be determined by considering the facts that were known at a time contemporaneous with the taking of the chemical sample. Consequently, there were many reasonable explanations that would have accounted for claimant’s accident other than her being impaired by drugs or alcohol. For example, claimant may have wrongly assumed the north-south traffic was also controlled by stop signs, she may have misjudged

² K.S.A. 44-501(d)(2)(A) and (B).

³ *Foos v. Terminix*, No. 89,239, ___ Kan. ___ (May 14, 2004).

the speed of the truck, she may not have seen the truck due to the manner light was being reflected on her windshield, or something may have distracted her attention. Even the officer who investigated the accident, trooper Jason Mills, testified there was a reasonable explanation for the accident other than drug use.⁴

The Board concludes probable cause did not exist at the time contemporaneous with the taking of the blood sample to believe claimant was impaired by drugs or alcohol while working. At that time, only a mere possibility existed that claimant was impaired by drugs or alcohol. And a mere possibility does not constitute probable cause. Accordingly, the results from the chemical sample are not admissible and should not be considered in this claim.

Further, without the results from the blood sample, the evidence fails to establish that claimant was impaired at the time of the accident or that the use or consumption of drugs or alcohol contributed to the accident. Consequently, the Judge's conclusion that claimant was entitled to receive workers compensation benefits for the November 19, 2002 accident should be affirmed.

WHEREFORE, the Board affirms the March 29, 2004 preliminary hearing Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ Mills Depo. at 80.